Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-8

BRUCE CARROLL GARLAND - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	PAGE
Petition for Writ of Certiorari	1– 9
Appendix	11–16
Affidavit for Search Warrant	11–13
Order	14
Order	15
Motion for Stay	16

CITATIONS

Cases:

	PAGE
United States v. Luna, 525 F. 2d 4	6
United States v. Thomas, 489 F. 2d 664	8

Constitutional Provisions, Statutes and Rules:

Fourth Amendment of the United States Constitution	4
Title 18 Section 3231	6
Rule 402 Federal Rules of Evidence	9
Rule 403 Federal Rules of Evidence	9

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BRUCE CARROLL GARLAND - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Garland, requests that the Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on May 10, 1978. A Petition for Rehearing was filed with the Court and it was denied on June 8, 1978.

1(a)

The opinion of the Court of Appeals was rendered on May 10, 1978 and is unreported. The order denying the Petition for Rehearing was entered on June 8, 1978 and is unreported.

1(b)

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 10, 1978 and it is final by its terms.

A rehearing was requested and was denied on June 8, 1978. The jurisdiction of this Court is invoked under the provisions of Title 28 USCA Section 1254(1).

1(c)

ATF Agent Wilt filed an affidavit for a search warrant. (Affidavit is attached.) He stated that from a distance of about twelve feet, he could smell the distinct odor of fermenting mash apparently emanating from a small wooden building. The building was situated in a hog lot. This was on February 3 and February 4 of 1977, and it had been a bitter winter. After the search warrant was issued, no mash was found. At the preliminary hearing, Agent Wilt testified that he could smell the distinct odor of fermented mash. A Motion to Suppress was duly made and a hearing was held in the District Court. At the trial of the case, Wilt testified that they did not find any mash and that the substance remaining in the barrels after the mash had been removed was a meal bed. Two state policemen testified to substantially the same facts. Wilt and the state patrolmen stated that they observed Garland on or about the premises on February 4, 1977. This was denied by Garland. In the search warrant, Agent Wilt set forth that he knew that Bruce Garland had been arrested on previous occasions for violation of the federal distilled spirits law and that Garland currently had a reputation for being engaged in the manufacture and sale of non-tax paid distilled spirits. At the preliminary hearing he was asked what information he had that Garland was operating a still.

He stated that local citizens, local officers, state police officers and city officers had given him that information. He could not recall specific names, dates or places and never furnished the name of any person giving him such information. He then testified that their knowledge of Garland's whiskey making activities was severely limited and that the information was that they felt that he was making whiskey. Garland had previously been convicted in federal court at Paducah, Kentucky in November of 1942, October of 1945, April of 1953 and January of 1959 for violations of the federal liquor laws. A period of eighteen years had elapsed since his last arrest or conviction. This investigation of Garland had been going on since September of 1976. The questions are:

(1) Are the erroneous statements in the Affidavit sufficient to suppress the evidence seized which resulted in Garland's conviction?

(2) Were the allegations in the affidavit recklessly made?

As a result of the search, the agents found fifty-three gallons of moonshine whiskey. The agent testified as to the tax rate of $10.50 per gallon. The Court ruled, over objection, that it was proper for the government to estimate the amount of taxes the United States had lost, but not for the agent to speculate what the price was. The agent then estimated that on the production of an average of twenty gallons per run and given two weeks off for vacation, he could compute what the tax on distilled spirits would be over a year's

production. The Defendant objected. Agent Wilt testified that the projected loss would be $10,000.00 over a year's period. The question is:

(1) Was this evidence prejudicial to the Defendant's substantial right?

1(d)

The Fourth Amendment of the United States Constitution which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

1(e)

In September of 1976, the ATF and state police began a joint investigation of Garland for liquor law violations. On February 3, 1977, Agent Wilt and a state trooper approached the hog lot in a rural section of Calloway County. This was one of the coldest winters on record. They did not observe anybody, but they both said they could smell the odor of fermenting mash. They returned again on February 4, 1977, and both agents testified that they saw Garland enter the shed and stay for about an hour. He did feed some hogs that were in the hog lot. Snow and ice were on the ground. Garland denied that he was present at the still site and at the trial, another person by the

name of Workman testified that it was his still, and that he had leased this thirty-three acre farm. On February 4, 1977, Agent Wilt proceeded to Hopkinsville, Kentucky, where he obtained a search warrant from a federal magistrate as a result of this affidavit. The search was conducted that night and the agents did not find any mash. They did find distilling apparatus and the cooking pot had been turned over, indicating that the still had not been in operation recently. They recovered fifty-three gallons of moonshine. In making the search, ice was found in the condensers of the still. As a result, Garland was indicted and convicted in the United States District Court at Paducah, Kentucky of violating Title 26 Section 5601(a)(1); 5601(a)(2); 5601(a)(4); 5601(a)(8); 5604(a)(1); 5681(a). He was sentenced to four years to serve. At the time of the case, Agent Wilt testified that they found fifty-three gallons of moonshine whiskey. He testified that the tax per gallon was $10.50. The prosecutor asked him what the raw materials would cost, to which an objection was made. At the bench, the Court stated that it was proper to estimate the amount of taxes the United States had lost, but not to allow him to speculate what the price was. Wilt, then in answer to a question, stated that in his opinion the still would produce twenty gallons per run and given two weeks off for vacation, he could compute what the tax would be over a year's production. Objections were duly made. Objection was made since there was no evidence that there was a year's production and the only tax that could be computed was of February 4, 1977. The

Court then instructed the jury that this was a hypothetical question and assuming that a still was carried on over a period of one year and assuming all of these things, of course, have to be proven by the United States beyond a reasonable doubt, and that no taxes had been paid on these spirits and what would the tax have been for a period of one year assuming two weeks vacation. Agent Wilt then testified that the projected loss to the government would be $10,000.00. The Court's instruction to the jury and Wilt's testimony were clearly prejudicial and irrelevant.

1(g)

The jurisdiction for the United States District Court for the Western District of Kentucky at Paducah is conferred by Title 18 Section 3231.

1(h)

The United States Court of Appeals for the Sixth Circuit has had an occasion to pass on a similar question in *United States* v. *Luna,* 525 F. 2d 4. At page 7 the Court stated:

> "We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if a misrepresentation is immaterial, it did not effect the issuance of the warrant and there is no justification for suppressing the evidence"

Wilt, in his affidavit, stated "I could smell the distinct odor of fermenting mash apparently emanating

from the small wooden building." This building was in a hog lot and as all of the officers testified and the Defendant testified, there is a similarity to the smell of fermenting mash and the odors of a hog lot. No mash was found as a result of the search. At the preliminary hearing, Wilt changed his testimony from the affidavit and stated it was fermented mash. At the trial, he said it was not mash, but a meal bed. His variations in his testimony shows that his statement in the affidavit was reckless, if not intentionally made. This investigation had been going on since September of 1976, and the agent in his zeal made a positive statement in the affidavit which was not true. The statement in the affidavit that Garland currently had a reputation for being engaged in the manufacture and sale of non-tax paid distilled spirits was a positive statement. At the preliminary hearing, he testified information was given to him by various citizens and officers, but he could not remember their names or dates. He testified that their knowledge of Garland's whiskey making activities was severely limited and that the information was they felt he was making whiskey. The positive statement as to his reputation in the affidavit was clearly a misrepresentation to the magistrate. This statement in the affidavit that he knew Garland had been arrested on previous occasions could only convey to the magistrate that these arrests were of recent origin. When, in fact, the last arrest and conviction of Garland was in 1959, some eighteen years previous to February 4, 1977. If the true facts had been given to an impartial magistrate, a search warrant would not

have been issued. This clearly was reckless, since the agent had since September of 1976, to determine the dates and what convictions Garland had received. This he failed to do. The Sixth Circuit has departed from its own rulings in holding that the allegations of Agent Wilt were not recklessly made. In its opinion, it simply stated that the facts in the affidavit for the search warrant were ample to establish probable cause. The Petitioner has never contended otherwise, but has contended that the statements in the affidavit were recklessly made and erroneous and the evidence should have been suppressed.

The decision of the United States Court of Appeals for the Sixth Circuit is in conflict with a decision from the Fifth Circuit. In that case, *United States* v. *Thomas,* 489 F. 2d 664 at page 669 the Court stated:

> "Therefore, we hold that affidavits containing misrepresentations are invalid if the error (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the showing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause for the search."

Two of the allegations in the affidavit were clearly erroneous and the statement as to Garland's previous arrest was recklessly made. When the three most essential allegations necessary for probable cause prove erroneous, it can only be concluded that they were intentionally made. The test laid down in *United States* v. *Thomas, supra,* should be adopted under the facts

in this particular case. This is an important question of federal law which has not been as far as the undersigned can determine settled by this Court.

The agents found fifty-three gallons of moonshine whiskey on the day of the search. The agent testified that it was taxable at a rate of $10.50 per gallon. The Court ruled, over objection, that the government could estimate the amount of taxes the United States had lost. The agent estimated that on the production of an average of twenty gallons per run over a year's time, given two weeks off for vacation, the tax loss would be $10,000.00. Timely objections were made to this evidence. The projected tax loss did not have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable and was not admissible under Rule 402 of the Federal Rules of Evidence. Furthermore, if it was admissible, it should have been excluded, for its probative value was substantially outweighed by the danger of unfair prejudice. Rule 403 Federal Rules of Evidence. The Court of Appeals has sanctioned such a departure by a lower court as to call for the exercise of this Court's power of supervision.

WHEREFORE, the Petitioner requests this Court that a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit reversing their decision in this case.

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Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE
WESTERN DISTRICT OF KENTUCKY

United States of America v. Premises known only as a hog lot situated approximately 7-9/10 miles south of Murray and approximately 1/2 mile West of Kentucky Highway 121 in Calloway County, in the Western District of Kentucky	Docket No. 77 Case No. 5253-01-P

AFFIDAVIT FOR SEARCH WARRANT—Filed
February 7, 1977

Before John M. Dixon, Jr.
Name of Judge[1] or Federal Magistrate
P. O. Box 627, Hopkinsville, Ky.
Address of Judge[1] or Federal Magistrate

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) a hot log consisting of one wooden structure and one cement block structure surrounded by fencing located by beginning on Kentucky Highway 121 at the South City Limits of Murray, Kentucky, proceeding in a Southerly direction on Ky. Highway 121 approximately 7-9/10 miles to an unmarked paved blacktopped road which is located adjacent to and across[1] from the Wisehart Grocery, then turning right on said road and proceeding in a Westerly

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[1]United States Judge or Judge of a State Court.

direction approximately 5/10 of a mile to a dirt lane, said lane being located between a red brick dwelling house and a small white dwelling house. Then turn left in a Southerly direction on said dirt lane approximately 300 yards to said premises or hog lot, which is surrounded by a barbed and woven wire fence containing one wooden structure with a green fiberglass roof and one cement block building in Calloway County in the Western District of Kentucky, there is now being concealed certain property, namely (here describe property) non-taxed-paid distilled spirits and equipment, ingredients and appartus which are (here give alleged grounds for search and seizure[2]) fit and intended for possession and use in violation of USC Title 26, Section 5604.

And that the facts tending to establish the foregoing ground for issuance of a Search Warrant are as follows:[3]

1. I am a Special Agent for the United States Treasury Department. 2. On or about February 3, 1977 I was in possession of information indicating that Bruce Garland was operating an illicit distillery and producing non-tax paid distilled spirits at the above location. On that same date I did proceed with Kentucky State Detective Ronald Murphy to that location through the open fields and woods. From the open woods I observed a hog lot containing the above structures. From a distance of about 12 feet while still in the open woods, I could smell the distinct odor of fermenting mash apparently emanating from the small wooden building described above. I conferred with Detective Murphy and he concurred that the odor was that of fermenting mash. Both Murphy and I have smelled fermenting mash on other occasions.

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[2]If a search is to be authorized "at any time in the day or night" pursuant to Rule 41(c), show reasonable cause therefor.

[3]If the warrant is to authorize execution pursuant to 21 U.S.C. §879 without prior notice of authority or purpose, indicate the circumstances creating the need for such a warrant.

On February 4, Kentucky State Detective Eugene Spillman and I were again in such position so as to observe the above described premises. On that occasion I did observe a man I recognized as Bruce Garland come to that premises in a silver Monte Carlo. Spillman has related to me that he observed, from his location, Garland enter both of the structures described above. As a Special Agent for the United States Treasury Department I know that Bruce Garland has been arrested on previous occasions for violations of Federal Law pursuant to non-tax-paid distilled spirits, and currently has a reputation for being engaged in the manufacture and sale of non-tax-paid distilled spirits.

(s) Raymond P. Wilt
Special Agent

Sworn to before me, and subscribed in my presence,

(s) John M. Dixon, Jr.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5311

United States of America - - Plaintiff-Appellee

v.

Bruce Carroll Garland - - Defendant-Appellant

ORDER—Filed May 10, 1978

Before: EDWARDS and KEITH, Circuit Judges, and RUBIN,* District Judge.

On receipt and consideration of an appeal in the above-styled case; and

After hearing oral arguments and considering the briefs and record and noting facts in the affidavit for the search warrant which in our view were ample to establish probable cause; and

Finding no other issue of significance, except the fact dispute as to whether or not plaintiff was engaged in operating the still in question; and

Believing that on the competent, if disputed, facts presented by this record the result of this issue was plainly for the jury,

Now, therefore, the judgment of conviction is affirmed.

Entered by order of the Court
(s) John P. Hehman
Clerk

---

*Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5311

United States of America - - Plaintiff-Appellee

v.

Bruce Carroll Garland - - Defendant-Appellant

ORDER—Filed June 8, 1978

Before: EDWARDS and KEITH, Circuit Judges, and RUBIN,* District Judge.

On receipt and consideration of a petition for rehearing; and

Noting therein no issue presented which was not carefully considered in advance of the court's order of May 10, 1978,

Now, therefore, said petition is denied.

Entered by order of the Court
(s) John P. Hehman
Clerk

---

*Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-5311

United States of America - - Plaintiff-Appellee

v.

Bruce Carroll Garland - - Defendant-Appellant

MOTION FOR STAY

On June 8, 1978, this Court entered an order denying the Appellant's Petition for Rehearing. The Order was not received until June 15, 1978. The Appellant respectfully requests the Court to stay the issuance of the Mandate for a period of thirty days, so that the Appellant may petition the Supreme Court of the United States for a Writ of Certiorari. The Appellant states that there is a substantial question regarding the search in this case and the admission of evidence in the trial court. The motion is not being requested for the purpose of delay. The Appellant has been on bond since the initial arrest and has always appeared in response to the Court's orders.

WHEREFORE, the Appellant requests the Court to stay the issuance of the Mandate for a period of thirty days.

(s) E. W. Rivers
Suite 801
Citizens Bank Building
Paducah, Kentucky 42001

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the United States Attorney, Federal Building, Louisville, Kentucky on this 15th day of June, 1978.

(s) E. W. Rivers

Supreme Court, U. S.
FILED
AUG 28 1978
MICHAEL RODAK, JR., CLERK

No. 78-8

In the Supreme Court of the United States

OCTOBER TERM, 1978

BRUCE CARROLL GARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-8

BRUCE CARROLL GARLAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 14) is noted in a table at 577 F. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. A petition for rehearing was denied on June 8, 1978. The petition for a writ of certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence against petitioner should have been suppressed because the affidavit of probable cause in support of a search warrant allegedly contained false information.

2. Whether petitioner was prejudiced by evidence of the tax losses resulting from his production of moonshine whiskey.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of operating an illegal still, in violation of 26 U.S.C. 5601, 5604, and 5681. He was sentenced to four years' imprisonment.[1] The court of appeals affirmed (Pet. App. 14).

1. The evidence at trial showed that petitioner owned a farm in Calloway County, Kentucky, and that he visited the farm frequently (Tr. 47, 51-52, 65-68, 90-91). On February 3, 1977, agents of the Bureau of Alcohol, Tobacco and Firearms visited the farm and smelled the odor of fermented mash emanating from a wooden building (Tr. 117-121, 266-270). The next day, the agents returned and saw petitioner enter the building and remain inside for about 30 minutes. On three or four occasions petitioner came to the door and looked outside. As petitioner drove away, the agents attempted to apprehend him, but he escaped (Tr. 128-130, 174-175, 197-198, 277-279).

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[1]Petitioner was convicted of having in his possession, custody or control an unregistered still or distilling apparatus, in violation of 26 U.S.C. 5601(a)(1) (Count 1); engaging in the business of a distiller without having filed an application for registration, in violation of 26 U.S.C. 5601(a)(2) (Count 2); carrying on the business of a distiller without having given a bond, in violation of 26 U.S.C. 5601(a)(4) (Count 3); producing distilled spirits without authorization, in violation of 26 U.S.C. 5601(a)(8) (Count 4); possessing distilled spirits without the required tax stamps, in violation of 26 U.S.C. 5604(a)(1) (Count 5); and engaging in the distilling of spirits without posting the required sign, in violation of 26 U.S.C. 5681(a) (Count 6). He was sentenced to concurrent terms of four years' imprisonment on Counts 1 through 5 and one year's imprisonment on Count 6.

The same day, the agents obtained a warrant and conducted a search of the building. Inside they found a partially deactivated still, which could be restored to working order in 15 to 30 minutes, and approximately 53 gallons of whiskey in white plastic jugs. There were no tax stamps on the jugs of whiskey. Treasury Department records showed that no application had been made and no bond had been filed for operation of the distillery (Tr. 141-153, 201-211, 281-310).

2. In the affidavit of probable cause in support of the warrant authorizing the search (Pet. App. 11-13), the affiant, a Treasury Department agent participating in the investigation, stated that he had received information that petitioner was operating an illegal distillery, that he and a state detective had smelled "the distinct odor of fermenting mash apparently emanating" from the building on February 3 (Pet. 12), that petitioner had been observed in the building on February 4, and that petitioner had previously been arrested for offenses involving untaxed spirits and had a reputation for making and selling untaxed spirits. Relying upon evidence adduced at his preliminary hearing before a magistrate, petitioner moved before trial to suppress the evidence seized pursuant to the warrant on the grounds that the affidavit contained inaccurate information. The trial judge denied this motion (Tr. 14).

ARGUMENT

1. Petitioner contends (Pet. 6-9) that his motion to suppress evidence should have been granted because the affidavit of probable cause contained inaccurate information.

In *Franks* v. *Delaware*, No. 77-5176, decided June 26, 1978, this Court held that false information in an affidavit in support of a search warrant application requires

suppression of evidence only if the false information is material to the existence of probable cause and is presented intentionally or in reckless disregard of its truthfulness.[2] In this case, however, petitioner did not succeed in convincing the district court, and has not demonstrated in his petition, that the information in the affidavit was even false, let alone intentionally or recklessly so.

Petitioner's primary contention is that, at the preliminary hearing (C.A. App. 13-14)[3] and at trial (Tr. 270) the agent described the smell as "fermented" mash, but in the affidavit he had described the odor as that of "fermenting" mash. On neither occasion, however, did petitioner attempt to enlarge upon what he now claims was a fatal discrepancy; nor has he ever suggested that the smell of fermented mash is any different from that of fermenting mash. Indeed, after the agent described the odor as that of fermented mash on direct examination at trial (Tr. 270), he responded in the affirmative when asked on redirect examination whether the odor was that of fermenting mash (Tr. 323), thus indicating that he used the terms interchangeably. The fact that the agents found

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[2]In view of the decision in *Franks*, there is no longer any need for this Court to resolve the differences that previously existed among the courts of appeals as to what types of false statements in affidavits of probable cause require suppression of evidence. See *United States* v. *Astroff*, 556 F. 2d 1369, 1371-1372 (C.A. 5), vacated on rehearing *en banc*, No. 76-2289 (August 11, 1978); *United States* v. *Collins*, 549 F. 2d 557, 561 (C.A. 8); *United States* v. *Lee*, 540 F. 2d 1205, 1209 (C.A. 4), certiorari denied, 429 U.S. 894; *United States* v. *Rosenbarger*, 536 F. 2d 715, 720 (C.A. 6), certiorari denied, 431 U.S. 965; *United States* v. *Marihart*, 492 F. 2d 897, 899-900 (C.A. 8), certiorari denied, 419 U.S. 827; *United States* v. *Carmichael*, 489 F. 2d 983, 989 (C.A. 7) *(en banc)*.

[3]"C.A. App." refers to the appendix filed by petitioner in the court of appeals.

a meal bed (residue from the fermentation process) and not mash itself does not impeach the affidavit, since the smell of a meal bed is similar to that of mash (Tr. 299).

Petitioner also challenges (Pet. 7) the agent's statements in the affidavit that petitioner had a reputation for producing untaxed spirits and had been arrested for such activity. Petitioner emphasizes the agent's inability to identify the sources of his information and the fact that petitioner's last arrest occurred in 1959 (C.A. App. 11; Tr. 6). But this attack, at most, tends to show only that the representations in the affidavit were somewhat weak, not that they were false. In any event, issuance of the warrant was amply justified by the affiant's statement that he smelled fermenting mash on petitioner's farm (see *United States* v. *Gillette*, 383 F. 2d 843, 848 (C.A. 2) and cases there cited; see also *United States* v. *Brown*, 487 F. 2d 208 (C.A. 4), certiorari denied, 416 U.S. 909), and accordingly, even if the statements of petitioner's reputation were unfounded, they were not sufficiently material to call the validity of the warrant into question.

2. Petitioner contends (Pet. 9) that the trial court improperly permitted a Treasury Department agent to testify that about $500 in taxes should have been paid on the 53 gallons of moonshine whiskey discovered on petitioner's farm and that about $10,000 in tax revenue would have been lost if petitioner operated his still for one year (Tr. 256-261). Even assuming that evidence of the projected tax loss was improperly admitted, petitioner was not prejudiced, since the court clearly instructed the jury that the agent's tax loss projection dealt with a "hypothetical situation" (Tr. 259).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

DOJ-1978-08